

(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **DEC 12 2013**

OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner:
 Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg

Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center (the director), denied the immigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner describes itself as a global software development and consulting firm. It seeks to permanently employ the beneficiary in the United States as an [REDACTED] senior analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). The petition is accompanied by a labor certification approved by the U.S. Department of Labor (DOL). The priority date of the petition is March 19, 2012, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the petitioner failed to establish its ability to pay the proffered wage since the priority date.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

On October 21, 2013, the AAO sent the petitioner a request for evidence (RFE) with a copy to counsel. The RFE requested missing evidence in support of the petitioner's ability to pay the proffered wage. Specifically, the AAO requested Internal Revenue Service (IRS) Forms W-2, Wage and Tax Statements, for the instant beneficiary and beneficiaries on whose behalf the petitioner had filed other Form I-140 immigrant petitions; the petitioner's 2012 Form 1120 U.S. Corporation Income Tax Return; and specific information regarding the proffered wages and withdrawal of Forms I-140 for beneficiaries on whose behalf the petitioner had filed other Form I-140 immigrant petitions. The RFE informed the petitioner that failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. *See* 8 C.F.R. § 103.2(b)(14).

The petitioner responded to the AAO's RFE on November 12, 2013. However, the petitioner failed to provide the specific information requested regarding the proffered wages and withdrawal of Forms I-140 for beneficiaries on whose behalf the petitioner had filed other Form I-140 immigrant petitions. Moreover, the evidence the petitioner did submit in response to the RFE reflects that previously submitted documentation, specifically payroll print-outs, provided incorrect information regarding the actual wages paid to the instant beneficiary and beneficiaries on whose behalf the petitioner had filed other Form I-140 immigrant petitions. Since the petitioner failed to submit

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

requested evidence that precludes a material line of inquiry, the petition will be denied pursuant to 8 C.F.R. § 103.2(b)(14). Further, the evidence in the record is not sufficient to establish the petitioner's ability to pay the proffered wage.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the ETA Form 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. See 8 C.F.R. § 204.5(d). The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its ETA Form 9089, Application for Permanent Employment Certification, as certified by the DOL and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the ETA Form 9089 was accepted on March 19, 2012. The proffered wage as stated on the ETA Form 9089 is \$120,875.00 per year. The ETA Form 9089 states that the position requires a master's degree in mathematics, computer engineering, computer science or electrical engineering or a bachelor's degree plus five (5) years of progressive experience.

The record indicates that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 2004, to have a gross annual income of \$5,000,000.00, and to currently employ 25 workers. On the ETA Form 9089, signed by the beneficiary on July 22, 2012, the beneficiary claimed to have worked for the petitioner since February 4, 2012.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg. Comm. 1977); see also 8 C.F.R. § 204.5(g)(2). In evaluating whether a job offer is realistic, United States Citizenship and Immigration Services (USCIS) requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. See *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg. Comm. 1967).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner submitted copies of Pay Stubs issued to the beneficiary for 2012 indicating that the petitioner had paid the beneficiary \$33,333.32 as of May 31, 2012 and a Payroll Details Report indicating that the petitioner pays the beneficiary \$8,333.33 per month (\$99,999.96 per year, which is still below the proffered wage). However, the IRS Form W-2 issued to the beneficiary by the petitioner for 2012 reflects that the petitioner only paid the instant beneficiary \$84,386.18 in 2012.

Counsel contends that the total amount paid to the beneficiary should include unpaid vacation and deductions made for health benefits and 401K contributions. However, counsel's contention regarding unpaid vacation is not persuasive² and the record does not contain sufficient evidence of the amount of any nontaxable fringe benefits which may not be reflected in the beneficiary's gross pay. A fringe benefit is a form of pay for the performance of services. A fringe benefit is taxable to the recipient employee unless the law specifically excludes it. See <http://www.irs.gov/pub/irs-pdf/p15b.pdf> (accessed October 3, 2013).³ The beneficiary's IRS Form W-2 for 2012 reflects that an additional \$3,500.00 of nontaxable income can be attributed to the instant beneficiary.⁴ This results in \$87,886.18 total actual wages paid to the instant beneficiary and not the \$99,999.96 per year reflected on the petitioner's payroll records.⁵ It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence

² The AAO considers evidence of wages paid to the beneficiary in determining whether the petitioner has the ability to pay the proffered wage. If the petitioner does not pay the beneficiary for vacation, this has no bearing on the overall wages paid to the beneficiary. In the instant case the proffered wage listed on the Form 9089 is an annual wage. The AAO will not consider an hourly wage to account for unpaid vacation hours by the beneficiary. Rather, the AAO will look to other evidence described in 8 C.F.R. § 204.5(g)(2) to determine whether the petitioner has the ability to pay the difference between the proffered wage and wages already paid to the beneficiary.

³ For federal tax purposes, an employer reports taxable fringe benefits in box 1 of an employee's IRS Form W-2. Nontaxable fringe benefits are excluded from box 1 of an employee's IRS Form W-2.

⁴ Box 12a of the Form W-2 lists code W, which is employer contributions to a health savings account (HAS). See <http://www.irs.gov/instructions/iw2w3/ch01.html#d0e3011>.

⁵ Examples of nontaxable fringe benefits include, but are not limited to, certain accident and health benefits, dependent care assistance (up to certain limits), group-term life insurance coverage, and health savings accounts (up to certain limits). See I.R.C. §§ 105, 129, 106. Employers may also offer cafeteria plans to their employees. See I.R.C. § 125. A cafeteria plan is a written plan that allows employees to choose between receiving cash or taxable benefits instead of certain qualified benefits for which the law provides an exclusion from wages. See <http://www.irs.gov/pub/irs-pdf/p15b.pdf> (accessed October 3, 2013). If an employee chooses to receive a qualified benefit under the plan, the qualified benefit is nontaxable if the benefits are excludable from gross income under a certain section of the Internal Revenue Code.

pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). While Box 14 reflects the amount of \$53.33 which may be eligible for inclusion in the total wages paid to the instant beneficiary, the designation of "PA UC" is unclear and the petitioner did not submit paystubs reflecting that the amount is nontaxable income which can be attributed to the instant beneficiary. Counsel also contends that the amount the petitioner paid for health insurance coverage should be included in the total wages paid to the instant beneficiary in 2012; however, the petitioner failed to submit pay statements for 2012 showing the beneficiary's amounts of gross pay, less amounts for any included health coverage for the instant beneficiary. Counsel submitted an invoice for health coverage of the petitioner's employees for November 1, 2013 through November 30, 2013; however, this documentation is not appropriate to establish payment of any fringe benefits for the instant beneficiary and it is also not applicable to the 2012 pay period.

In addition, according to USCIS records, the petitioner has filed multiple I-140 petitions on behalf of other beneficiaries. If a petitioner has filed multiple petitions for multiple beneficiaries, it must establish that it has the ability to pay the proffered wages to each beneficiary. See *Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977). See also 8 C.F.R. § 204.5(g)(2). In determining whether the petitioner has established its ability to pay the proffered wage to multiple beneficiaries, USCIS will add together the proffered wages for each beneficiary for each year starting from the priority date of the instant petition, and analyze the petitioner's ability to pay the combined wages. However, the wages offered to the other beneficiaries are not considered for the period prior to the priority dates of their respective Form I-140 petitions, after the dates the beneficiaries obtained lawful permanent residence, or after the dates their Form I-140 petitions have been withdrawn, revoked, or denied without a pending appeal. In addition, USCIS will not consider the petitioner's ability to pay additional beneficiaries for each year that the beneficiary of the instant petition was paid the full proffered wage.

In the RFE, the AAO acknowledged receipt of a list of 2012 proffered wages, status and salary for beneficiaries of the other Forms I-140; and Payroll Details Report reflecting 2012 monthly wages for 7 of the 8 other Form I-140 beneficiaries. As shown below, the Payroll Details Report for 2012 reflected that none of the beneficiaries are paid the proffered wages and some are not paid the required H-1B wage. As discussed above in the context of the beneficiary, counsel's similar contentions regarding unpaid vacation and nontaxable benefits for the other beneficiaries are unpersuasive or are not supported by the record.

<u>Receipt Number</u>	<u>Beneficiary Name</u>	<u>Proffered Wage</u>	<u>Payroll Wage 2012</u>	<u>H-1B Wage</u>	<u>Adjusted/ Withdrawn</u>
		MISSING	\$105,000.00	MISSING	N/A
		MISSING	\$93,000.00	MISSING	N/A
		\$76,000.00	\$69,521.04	\$73,675.00	N/A
		\$200,000.00	\$188,000.04	MISSING	4/7/2012

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	\$112,300.00	\$98,000.04	\$114,255.00	N/A
	\$120,000.00	\$105,000.00	MISSING	1/14/2012
	\$113,000.00	\$105,936.24	\$113,000.00	N/A
	\$95,000.00	MISSING	MISSING	Depart/no withdrawal

Despite the AAO's request to provide the missing information as indicated in the chart above for each beneficiary for whom it had filed a Form I-140, the petitioner failed to provide a withdrawal notice or the listed missing information. Moreover, as reflected in the table below, the evidence submitted in response to the RFE reflects a similar disparity between the wages reported by the petitioner on the payroll records and what was actually paid to those beneficiaries as reflected on their 2012 IRS Forms W-2.⁶ While Box 14 reflects varying amounts of money which may be eligible for inclusion in the total wages paid to the beneficiaries, the designations listed are unclear and the petitioner did not submit paystubs establishing that the amounts are nontaxable income which can be attributed to those beneficiaries.

<u>Receipt Number</u>	<u>Beneficiary Name</u>	<u>Proffered Wage</u>	<u>Payroll Wage 2012</u>	<u>Actual Wage Paid</u>
		MISSING	\$105,000.00	\$90,000.00
		MISSING	\$93,000.00	\$89,245.86
		76000.00	\$69,521.04	\$67,017.15
		\$200,000.00	\$188,000.04	\$183,344.04
		\$112,300.00	\$98,000.04	\$93,320.04
		\$120,000.00	\$105,000.00	\$110,000.00
		\$113,000.00	\$105,936.24	\$99,075.64
		\$95,000.00	MISSING	\$4,104.50

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d

⁶ The actual wages paid includes wages and other compensation listed in box 1 and any deductions listed in box 12.

1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Reliance on the petitioner's gross sales and profits and wage expense is misplaced. Showing that the petitioner's gross sales and profits exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient.

In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now USCIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income. *See Taco Especial v. Napolitano*, 696 F. Supp. 2d at 881 (gross profits overstate an employer's ability to pay because it ignores other necessary expenses).

With respect to depreciation, the court in *River Street Donuts* noted:

The AAO recognized that a depreciation deduction is a systematic allocation of the cost of a tangible long-term asset and does not represent a specific cash expenditure during the year claimed. Furthermore, the AAO indicated that the allocation of the depreciation of a long-term asset could be spread out over the years or concentrated into a few depending on the petitioner's choice of accounting and depreciation methods. Nonetheless, the AAO explained that depreciation represents an actual cost of doing business, which could represent either the diminution in value of buildings and equipment or the accumulation of funds necessary to replace perishable equipment and buildings. Accordingly, the AAO stressed that even though amounts deducted for depreciation do not represent current use of cash, neither does it represent amounts available to pay wages.

We find that the AAO has a rational explanation for its policy of not adding depreciation back to net income. Namely, that the amount spent on a long term tangible asset is a "real" expense.

River Street Donuts at 118. "[USCIS] and judicial precedent support the use of tax returns and the *net income figures* in determining petitioner's ability to pay. Plaintiffs' argument that these figures should be revised by the court by adding back depreciation is without support." *Chi-Feng Chang* at 537 (emphasis added).

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, USCIS will review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ For a C corporation,

⁷According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist

USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets. The petitioner's 2012 tax return reflects \$7,146.00 in net income and -\$67,577.00 in net current assets. Therefore, for the year 2012, the petitioner did not have sufficient net income or net current assets to pay the difference between the proffered wage and the actual wages paid to the instant beneficiary, let alone the difference between the proffered wages and the actual wages paid to the other beneficiaries.

Therefore, from the date the ETA Form 9089 was accepted for processing by the DOL, the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage as of the priority date through an examination of wages paid to the beneficiary, or its net income or net current assets.

Counsel asserts in response to the RFE that the petitioner need not pay the beneficiaries the proffered wage until they become lawful permanent residents. However, the petitioner must still be able to show its ability to pay the proffered wages from the priority date. In the instant case, the AAO has considered wages already paid to the beneficiary (\$87,886.18). The petitioner must demonstrate its ability to pay the difference between the proffered wage and the wages already paid, which is \$32,998.82 for the instant beneficiary. The petitioner must also demonstrate its ability to pay the difference between the proffered wages and wages already paid for the beneficiaries of all Form I-140 immigrant petitions it filed from the priority date until each of those petitions is denied, withdrawn or the beneficiary has adjusted status to lawful permanent residence.

Counsel's assertions on appeal cannot be concluded to outweigh the evidence presented in the tax returns as submitted by the petitioner that demonstrates that the petitioner could not pay the proffered wage from the day the ETA Form 9089 was accepted for processing by the DOL.

USCIS may consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about \$100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her

of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Counsel contends that the petitioner had sufficient gross receipts to establish its ability to pay the proffered wages. However, as noted above, reliance on gross receipts and wage expense is misplaced, as gross receipts fail to include necessary expenses. The petitioner also failed to provide necessary information regarding beneficiaries of other Form I-140 immigrant petitions, thereby precluding the AAO from making a determination as to whether the petitioner had the ability to pay all of the proffered wages in 2012. Further, the evidence submitted regarding payment of wages to other beneficiaries is inconsistent. *Matter of Ho*, 19 I&N Dec. at 591-92. In addition, there is no evidence in the record of the historical growth of the proprietor's business, of the occurrence of any uncharacteristic business expenditures or losses from which it has since recovered, or of the petitioner's reputation within its industry. The petitioner's tax returns reflect a significant decrease in net income from 2001 to 2012 (from \$21,172.00 to \$7,146.00). Although the petitioner also submitted its 2012 balance sheet and profit and loss statements, the information listed does not vary from the tax return and does not demonstrate that the petitioner's tax returns paint an inaccurate financial picture. Thus, assessing the totality of the circumstances in this individual case, it is concluded that the petitioner has not established that it had the continuing ability to pay the proffered wage.

The evidence submitted does not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The appeal is dismissed.